Supreme Court, U.S.
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In The

Supreme Court of the United States

MICHAEL TREADWAY,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondents.

On Petition For Writ Of Certiorari
To The Court Of Appeal Of The State Of California
Fourth Appellate District, Division Three

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) DOES CALIFORNIA VEHICLE CODE §23550 OFFEND THE *EX POST FACTO* CLAUSE OF THE UNITED STATES CONSTITUTION AS INTERPRETED IN *STOGNER V. CALIFORNIA* WHEN APPLIED TO A "WASHED OUT" PRIOR OFFENSE WHOSE PERIOD OF DISABILITY EXPIRED BEFORE THE EFFECTIVE DATE OF AN AMENDMENT EXTENDING PRIORABILITY FROM SEVEN TO TEN YEARS?

(2) IS DUE PROCESS VIOLATED WHEN CALIFORNIA EXTENDS A PERIOD OF PRIORABILITY BEYOND THAT SPECIFIED IN A PLEA AGREEMENT SUBJECTING PETITIONER TO FELONY DUI PROSECUTION?

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OPINION BELOW

The opinion of the California Court of Appeal, Fourth District, Division 3 is reported at 163 Cal.App.4th 689 (2008). A copy of the opinion is attached as App. 1-14. The California Supreme Court issued a one page order denying discretionary review on August 20, 2008. A copy of the order is attached as App. 15.

JURISDICTION

The decision of the California Court of Appeal Fourth Appellate District, Division 3 affirming the ruling of the Superior Court of the State of California, Harbor Justice Center was filed on June 3, 2008. A timely Petition for Review in the California Supreme Court was denied on August 20, 2008. This Court has jurisdiction pursuant to 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

A. Federal Constitutional Provisions

United States Constitution, Article I, Sec. 10:

"No state shall . . . pass any . . . ex post facto law, or law impairing the obligation of contracts. . . ."

U.S. Const., 14th Amend., Sec. 1:

"[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . "

B. State Statutes:

California Vehicle Code §23550 (1997) (Stats. 2004, ch. 550, §15, p. 3392)

"If a person is convicted of a violation of §23152 and the offense occurred within 7 years of three or more separate violations of . . . §23152 . . . that resulted in convictions, that person shall be punished by imprisonment in the state prison, or in county jail . . . "

California Vehicle Code §23550 (2005)

"If a person is convicted of a violation of §23152 and the offense occurred within 10 years of three or more separate violations of . . . §23152 . . . that resulted in convictions, that person shall be punished by imprisonment in the state prison, or in county jail . . . "

STATEMENT OF THE CASE

In 1981, the California Legislature adopted a limited form of habitual offender statute directed at Driving Under the Influence (DUI) cases (*see* Stats.

1981, ch. 940). These statutes enhanced the punishment for a subsequent DUI offense based on the number of prior DUI convictions in the previous five years. In 1986, the legislature extended the period of priorability from five to seven years. In 2004, the California Legislature again extended the period of priorability of DUI cases from seven to ten years (Stats. 2004, ch. 550). This statutory scheme differs from most habitual offender statutes because it places specific time limits on the use of a separate violation.

Prior to January 1, 2005, the State of California assured defendants convicted of Vehicle Code §23152(a)&(b) they would only be subject to having a DUI elevated from a misdemeanor to a felony were they to have had three separate offenses, which resulted in convictions, within seven years from the date of a new offense. After the seven-year period elapsed, they were no longer subject to having a misdemeanor DUI offense elevated to a felony. In other words, they were able to come out from under a cloud and walk in the sunshine. As of January 1, 2005, the period of disability was extended to ten years.

Petitioner was charged with a DUI violation which occurred on September 10, 2005. Three separate convictions were alleged pursuant to Vehicle Code §23550 with conviction dates of August 6, 1998, August 6, 1998 and August 14, 2003. The date of offense for the oldest alleged separate offense was December 8, 1997. Thus, Petitioner's period of disability expired on December 8, 2004, more than seven

years from the date of the oldest violation and prior to the effective date of the Amendment to §23550.

When Petitioner entered his plea of guilty to his December 8, 1997 DUI, he executed a plea agreement (*see* App. 16-31). Petitioner initialed the various provisions of the plea agreement some 70 times, and signed it in three places. The second page of the form also contains the statement from the Petitioner that "I have personally initialed each of the above boxes and understand each and every one of the rights outlined above." Petitioner initialed *each* term of the agreement, including the priorability limits, to show that he had read, understood, and agreed to each one and signed the form under penalty of perjury.

Petitioner filed a Demurrer and Motion to Strike the December 8, 1997 prior allegation on the grounds that the use of this time-barred predicate offense violated Article I, Sec. 10 of the United States Constitution's prohibition against *ex post facto* laws as understood by this Court in *Stogner v. California* 539 U.S. 607 (2003) and that the use of the time barred offense violated the 14th Amendment's Due Process Clause and was a breach of the plea agreement.

Petitioner's Demurrer and Motion to Strike was heard and denied on March 7, 2006 and Petitioner thereafter entered his pleas of guilty to the charges filed against him and reserved his right to appeal the denial of his challenge to the use of the 1997 offense to elevate the misdemeanor DUI to a felony.

Petitioner's appeals followed and he pressed his Federal Constitutional claims before the Court of Appeal of the State of California and the California Supreme Court.

Simply stated, the Court below held that increased punishments for DUI recidivists attached to the latest offense, not the prior offense, and as a result, were not retroactive or *ex post facto* because the increased punishment was for the new case which occurred after the passage of the amendments to Vehicle Code §23550. Some might call this sophistry. Others might argue that the *Treadway* Court's view of *ex post facto* is myopically focused on punishment. Petitioner relies on Justice Chase's original characterizations of what are *ex post facto* violations enumerated as Category (2) and Category (4) in *Calder v. Bull* (1798) 3 U.S. (Dall.) 389 and not on *Calder's* Category (3) punishment categorization. These two Categories of *ex post facto* were analyzed and explained in *Stogner*, 539 U.S. 607, which held that a statute which revived a time-barred prosecution was a violation of *ex post facto* because it (1) aggravated the original crime and made it greater than it was when committed because the defendant is subject to "punishment that the courts lacked the power to impose" before the amendment (*Calder* Category 2) (*Stogner*, 539 U.S. at 615); and (2) it alters rules of evidence, and receives less, or different testimony "than the law required at the time of the commission of the offense in order to convict the offender" (*Calder* Category 4) (*Stogner*, 539 U.S. at 612).

As applied to Petitioner, the amending legislation aggravated his original 1997 offense and made it more burdensome because it extended the disability period attached to it after it had expired, depriving him of a vested defense.[1]

As applied to this Petitioner, the amending legislation changed the quantum of evidence necessary to establish the existence of a necessary quasi-element of the felony offense, namely the existence of a prior conviction for an offense which occurred within the proscribed statutory period.

After December 8, 2004 and through December 31, 2004 the District Attorney could not have proven that Petitioner's prior DUI came within the meaning of Vehicle Code §23550 because no "quantum of evidence" could have provided the requisite proof. Thus, the amending legislation which became effective on January 1, 2005 violates *ex post facto* rules if applied retroactively.

As noted by the venerable Justice Learned Hand in *Falter v. United States* (2nd Cir. 1928) 23 F.2d 420, 425-426, cert. denied, 277 U.S. 590:

> Certainly it is one thing to revive a prosecution already dead, and another to give it a longer lease of life. The question turns upon how much violence is done to our instinctive

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[1] Had Petitioner re-offended between December 9, 2004 and December 31, 2004, he would not have been subject to a felony DUI prosecution based upon his December 8, 1997 prior offense.

> feelings of justice and fair play. For the state to assure a man that he has become safe from its pursuit, and thereafter to withdraw its assurance, seems to most of us unfair and dishonest. But, while the chase is on, it does not shock us to have it extended beyond the time first set, or, if it does, the stake forgives it. *Id.* at 426.

The same can be said for extending the period of disability which subjects a citizen convicted of DUI to felony prosecution for future violations. If the period of disability has lapsed, it can no longer be legislatively revived without violating the prohibition against *ex post facto* laws.

The harm that would be manifested if the amending legislation could be applied to Petitioner's December 8, 1997 DUI conviction is of the kind that the *Ex Post Facto* Clause seeks to avoid. By "its own rules" (*see Carmell v. Texas* (2000) 529 US. 513, 533), the legislature advised Petitioner that his prior DUI conviction could have an enhancement effect for seven years. After that period, not before, the legislature changed those rules. Since the legislature thereby acted after it had assured defendant that he "had become safe from its pursuit," the legislative amendment would "seem . . . unfair and dishonest." (*Falter*, 23 F.2d at 426.) Further, since it did not act until the earlier limitations period had lapsed, the legislature deprived defendant of "fair warning" (*Weaver v. Graham* (1981) 450 U.S. 24, 28) of continued criminal liability after he could otherwise have

assumed he had left behind the disabilities associated with his prior DUI conviction. As noted in *Stogner*, "[A] Constitution that permits such an extension, by allowing legislatures to pick and choose when to act retroactively, risks both 'arbitrary and potentially vindictive legislation' and erosion of the separation of powers . . . " *Id.* at 612.

The Court of Appeal also rejected Petitioner's Federal Constitutional Due Process and Contract challenges and found that there was no evidence that Petitioner had relied upon the limitation and, even if he had, that such reliance would have been unreasonable. The Court further noted that there was no indication that Petitioner had ever received any assurances that the legislature would not change the seven year limitation on priorability. *People v. Treadway*, 163 Cal.App.4th at 698.

California's approach to this law has two major problems: First, changing the law and applying it to people who had escaped its grasp violates *ex post facto* doctrine as previously explained by this Court in *Stogner*. Second, such application violates Due Process under the United States Constitution by not giving the defendant proper benefit of the terms of his plea agreement a contract which specifically includes a provision limiting the length of priorability. In other words, the State of California changed the rules of the game after the game had been played.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH *EX POST FACTO* DOCTRINE

At issue in the instant case is the jurisprudential brick and mortar of the criminal justice system: The people's right to a government that abides by the laws it both establishes and enforces. Constitutional temperance requires that the repugnance of an alleged crime cannot justify the departure from the bedrock of the United States Constitution. The *Ex Post Facto* Clause operates to constrain legislative power by demanding fundamental fairness illuminated by governmental restraint.

A. The Controlling Federal *Ex Post Facto* Doctrine

The *Ex Post Facto* Clause relevant to the States is embodied in Art. I, §10, Cl. 1 of the United States Constitution. It is an express restraint upon the power of the state legislatures that prohibits arbitrary or vindictive retroactive legislation. *Malloy v. South Carolina* (1915) 237 U.S. 180, 183. It upholds separation of powers by confining the legislature to penal decisions with prospective effect and the judiciary and executive branches to application of existing penal laws. *Weaver v. Graham* (1981) 450 U.S. 24, 29, n. 10. The determination of whether a law falls within the *ex post facto* prohibition centers on an

analysis of the purpose for the subject legislation. *Weaver*, 450 U.S. at 30-31.[2]

Five years prior to *Marbury v. Madison* (1803) 5 U.S. 137, establishing the province of the judiciary to declare what acts of the legislature are and are not congruent with the dictates of the Constitution, *Calder v. Bull*, 3 U.S. (Dall.) 389, broke uncharted ground when it construed the meaning and breadth of the *Ex Post Facto* Clause. Justice Chase delineated four bright-line categories of facially *ex post facto* laws, while noting that "all these and similar laws" are *ex post facto*. *Calder*, 3 U.S. at 390-91.

Justice Chase divided *ex post facto* laws into four categories:

> I will state what laws I consider *ex post facto* laws, within the words and the intent of the prohibition. 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that

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[2] This bill originally sought to remove any and all wash-out periods from DUI recidivist statutes and make priors lifetime. The Hearings further noted that this legislation was intended to deter recidivism in DUI cases by eliminating the wash-out period. The bill in its final form extended the disability period from (7) to (10) years evidencing their intent to limit the period of disability which flowed from a DUI offense. *See*, Hearing Notes of Senate Comm. on Public Safety (April 20, 2004) SB 1694.

> changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender. All these, and similar laws, are manifestly unjust and oppressive. *Id.* at 390.

Calder, however, did not limit the categorization of *ex post facto* laws exclusively to those categories borne out by colonial experience. Justice Chase expounded upon what other types of laws would fall within the *ex post facto* prohibition, stating that he considered laws taking away or impairing rights to be *ex post facto*, but not laws that "mollified" or assuaged the rigor of the criminal law.

Thus the origins of *ex post facto* analysis exposes whether "extending a period of disability" offends the Constitution. Justice Chase clearly indicated that it is acceptable to "save" time from the statute of limitations because such legislation mollifies or assuages the rigor of the criminal law and therefore, does not offend the *ex post facto* prohibition. *Calder*, 3 U.S. at 391. Hence the converse is equally clear – that to "extend a period of disability" is to unconstitutionally *increase* the rigor of the criminal law in violation of the *ex post facto* prohibition.

Justice Chase explained that the prohibition was intended to be "an additional bulwark in *favour* of the personal security of the subject, to protect his person

from punishment by legislative acts, having a retrospective operation." *Id.* at 390. He continued his analysis noting that "the restriction not to pass any *ex post facto* law, was to secure the person of the subject from injury, or punishment, in consequence of such law." *Id.* Justice Chase then analyzed what antecedent facts the *Ex Post Facto* Clause applied to and noted:

> The prohibition, in the letter, is not to pass any law concerning, and after the fact; but the plain and obvious meaning and intention of the prohibition is this; that the Legislatures of the several states, shall not pass laws, **after a fact** done by a subject, or citizen, *which* ***shall have relation to such fact****, and shall punish him for having done it. Calder*, 3 U.S. at 390 (emphasis added).

Thus, if the statute in question relates back to acts done before its enactment and changes the law in a way that aggravates that offense so as to inflict punishments that were no longer available it is *ex post facto. Stogner v. California* (2003) 539 U.S. 607.

Ex post facto analysis is not a talismanic exercise. It encompasses considerations of fundamental fairness and critical examination of the propriety of the subject legislation for the purpose of guarding against the legislative tyranny that prompted The Framers to **twice** include the prohibition in the original Constitution – what Chief Justice Marshall called "A bill of rights for the people of each State."

Cummings v. Missouri (1866) 71 U.S. 277. This analysis requires that the subject legislation be gauged by the evils the *Ex Post Facto* Clause was designed to guard against because The Framers could hardly anticipate every conceivable act of invidious legislative ingenuity for centuries to come. *Cf. McCulloch v. Maryland* (1819) 17 U.S. 316, 407 ("Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves.").

In *Stogner v. California* this Court struck down a California statute that allowed the revival of sexual assault charges otherwise past the statute of limitations. *Stogner* noted that the law in question extended the time within which prosecution was allowed, authorizing prosecutions that the passage of time had previously barred, and became effective after prior limitations periods for these alleged offenses expired. The Court noted that "these features of the law, when taken together produced the kind of retroactivity that the constitution forbids." *Stogner*, 539 U.S. at 610. It relied heavily on *Calder v. Bull*, 3 U.S. 389, and reiterated Justice Chase's four categories. The *Stogner* Court also stated that an expired statute of limitations, such as we have in the instant case, should not be revived:

> [W]e agree that the State's interest in prosecuting child abuse cases is an important one, but there is also a predominating constitutional interest in forbidding the State to

> revive a long-forbidden prosecution. And to hold that such a law is *ex post facto* does not prevent the State from extending time limits for the prosecution of future offenses, or for prosecutions not yet time barred. *Id.* at 632

Stogner noted that since the original statute of limitations had expired, a party such as Stogner was not "liable to any punishment." California's new statute therefore "aggravated" Stogner's alleged crime, or made it "greater than it was, when committed." *See also* H. Black, American Constitutional Law §266, p. 700 (4th ed. 1927) (hereinafter Black, American Constitutional Law) ("[A]n act condoned by the expiration of the statute of limitations is no longer a punishable offense.").

B. California's Erroneous Interpretation

Now that the controlling doctrine has been elucidated, the errors in California's approach will become apparent. Not only do California's courts deny that the law in question violates *ex post facto*, but they first attempt to take the question out of *ex post facto* jurisprudence by denying that the law in question; (1) acts as a statute of limitations; (2) that the extension of the time barred disability is not a substantive change in the law and (3) that the statute acts retroactively. However, on these three preliminary issues, California's interpretation is also contrary to the Federal precedent.

1. California Vehicle Code §23550 Acts as a Statute of Limitations

Vehicle Code §23550 represents a special form of habitual offender statute, one which contains a provision that limits, in time, its application. While the legislature had the power to enact the more traditional habitual offender statute for DUI without limiting the period of priorability, they chose not to. In fact, they considered and rejected[3] such a proposal choosing instead to limit the amendment to an increase in the period of priorability of any separate offense from seven years to ten years. While it may be true that a statute is not retroactive in operation merely because it draws upon facts antecedent to its enactment for its operation *Gryger v. Bruke*, 334 U.S. 728 (1948) it is a retroactive law if its operation creates a ***different legal effect*** than that which occurred before its passage and that effect is disadvantageous to a criminal defendant. In this case, the law at issue is both retrospective and retroactive. It is retrospective in that it refers in its operation to events, specifically separate DUI offenses, which occurred in the past. It is retroactive, at least in the limited case of Appellant in that it changes the length of time that a DUI offense which results in a conviction can be used to elevate a future offense from a misdemeanor to a felony by including time barred offenses which have expired prior to the amendment

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[3] The first draft of the bill called for life-time use of separate offenses in DUI cases. See footnote 2, supra.

to Vehicle Code §23550. The legislature elected to include time limits on the priorability of a DUI. That distinguishes §23550 from typical habitual offender statutes which have no sunset provision and that is why application of the extension of that period of priorability to a time barred separate offense is *ex post facto* since it aggravates that offense under *Calder's* Category Two.

A statute of limitations is a time period after which a particular action may no longer be brought or rights enforced. "In criminal cases, however, a statute of limitations is an act of grace, a surrendering by the sovereign of its right to prosecute." Black's Law Dictionary, Abridged 6th Edition, West, 1991. The legislature essentially creates an amnesty, preventing the government from prosecuting. Wharton, Criminal Pleading and Practice §316, p. 210 (8th ed. 1880) ("The statute [of limitations] is . . . an amnesty . . . and repeal of an amnesty is an *ex post facto* violation). *Stogner*, 539 U.S. at 617. It is a self imposed limitation on the power of the state as noted by Francis Wharton in 1874 when he emphasized the historic role of statutes of limitations as "acts of grace or oblivion, and not of process," "extinguish[ing] all future prosecution" and making an offense unable to "be again called into existence at the caprice of the prince." Wharton, 1 Criminal Law §444*a*, at 347-348, n. *b.*; *Stogner,* 539 U.S. at 619. Wharton's comments hold particular significance in this instance where the State must call back into existence and exhume, Lazarus – like, the moribund prior.

The Court of Appeal rejected Petitioner's arguments that *Stogner* controlled and relied on *People v. Forrester* 207 Cal.App.4th 1021 (2007) (*cert. denied*), *Forrester v. California*, __U.S. __, 129 S.Ct. 94 (2008) which held that there was a "difference between reviving a prosecution in its entirety after the statute of limitations has run, and enhancing the sentence in a new criminal prosecution stemming from new criminal conduct" *Forrester*, 207 Cal.App.4th at 1025. The Court of Appeal agreed with *Forrester* and held that *Stogner* did not apply because the amendment extending the period of disability became effective more than a year before the date of Treadway's new arrest and he was therefore on notice of the possible consequences of a new violation. Finally, the Court held that Petitioner had not been deprived of a "vested defense" because the statute extending the maximum period of prior offenses was enacted before Petitioner's most current offense. *Treadway*, 163 Cal.App.4th at 697-8.

The reliance on *Forrester* is misplaced because *Forrester* reads *Stogner* too narrowly. The court in *Forrester* continues to perpetuate the flawed analysis of *People v. Sweet*, 207 Cal.App.3d 78 (1989) by stubbornly insisting that the retroactive increase in the period of disability does not change the effect of the original predicate offense making its terms more onerous for a criminal defendant. The Court simply focused on an analytical paradigm that stops with the assumption that there is no retroactivity because Petitioner was only being punished for his new

offense and he had notice of the change in the law. A punishment oriented analysis may be appropriate for analyzing whether the amendment violated Calder's Category Three, but it does not answer Petitioner's claims that the amendment violated *Calder's* Category Two *ex post facto* because it aggravated his 1997 offense and required less and different proof to hold him to answer for a felony offense at a preliminary hearing in violation of *Calder's* Category Four.

The Court below adopted the reasoning in *Forrester* that *Stogner* was distinguishable because "Unlike Stogner, [the defendant] has not been charged with a crime for which the statute of limitations has run." *Treadway*, 163 Cal.App.4th at 698 (quoting *People v. Forrester*, 156 Cal.App.4th at 1025) This reasoning fails to recognize that Treadway's period of disability had extinguished prior to the amendment of §23550 and had "run" just like the period of limitations in *Stogner.*

2. The Change to California Vehicle Code §23550 Was a Substantive Change in the Law

Courts in California have held that *ex post facto* applies only to substantive changes in the law and not those which are merely procedural. The Court below relied upon *People v. Sweet*, 207 Cal.App.3d 78, 83-84 (1989) which reflected that "[t]he extension of a period of limitations is a change in procedure only, to which the *ex post facto* doctrine does not apply. The

Sweet Court added that "[o]nly where the limitations period has already expired, barring prosecution, will an amendment effectively extending the statutory period not apply to an offense committed before the legislative change." *Sweet*, 207 Cal.App.4th at 83. Petitioner agrees!

This Court has recognized that "by simply labeling a law 'procedural,' a legislature does not thereby immunize it from scrutiny under the *Ex Post Facto* Clause. Subtle *ex post facto* violations are no more permissible than overt ones." *Collins*, 497 U.S. at 46. The *Ex Post Facto* Clause "cannot be evaded by the form in which the power of the State is exerted." *Cummings v. Missouri* (1867) 4 Wall. 277, 329.

Therefore, Petitioner has clearly demonstrated that changing the sunset provision of Vehicle Code §23550 was a substantive change in the law, to which *ex post facto* doctrine definitely applies.

3. California Vehicle Code §23550 Acts Retroactively

In interpreting the *Ex Post Facto* Clause of our founding documents, this Court has determined that there are two key prerequisites, two "critical elements," that must be present in order to find that a statute violates the *ex post facto* doctrine. *Miller v. Florida* (1987) 482 U.S. 423, 430 (*Miller*); *Weaver v. Graham* (1981) 450 U.S. 24, 29 (*Weaver*).

First, it is important to distinguish between a retrospective law and a retroactive law. A retrospective law is one which refers in its operation to events that occurred in the past. All recidivist statutes are by nature retrospective, in that they refer to prior conduct of the defendant. This does not make them retroactive.

Justice Chase set forth his clear view of what he deemed to be retroactive and what was merely retrospective. He noted:

> "In my opinion, the true distinction is between *ex post facto* laws, and retrospective laws. Every *ex post facto* law must necessarily be retrospective; but every retrospective law is not an *ex post facto* law: The former, only, are prohibited. **Every law that takes away, or impairs, rights vested, agreeably to existing laws, is retrospective, and is generally unjust; and may be oppressive; and it is a good general rule, that a law should have no retrospect**: but there are cases in which laws may justly, and for the benefit of the community, and also of individuals, relate to a time antecedent to their commencement; as statutes of oblivion, or of pardon. They are certainly retrospective, and literally both concerning, and after, the facts committed. *But I do not consider any law ex post facto, within the prohibition, that mollifies the rigor of the criminal law*; but only those that create, or aggravate, the crime; or encrease [sic] the punishment,

> or change the rules of evidence, *for the purpose of conviction.*" *Calder*, 3 U.S. at 389.

Vehicle Code §23550 is retroactive because it is dependent upon facts antecedent to its enactment which alters the legal consequences from those in effect at the time of the act since §23550 not only requires proof of the separate DUI offense but also requires that the separate offense occurred within a specified period of time from the new offense. It is the extension of the period of disability accomplished retroactively to time barred separate offenses that offends *ex post facto.*

In *Weaver*, 450 U.S. 24, the Court addressed whether a change to prisoners' abilities to earn good time credits could be applied, not to deprive prisoners of good time credits already earned, but to affect the reciprocity of inmates' good time credits as reward for good behavior *after* the law's effective date. The Court distilled from the web of *ex post facto* jurisprudence the essence of the inquiry, *to wit:* "The critical question is whether the law changes the legal consequences of acts completed before its effective date." *Id.* at 31.

Stated another way, the Court wrote that the "critical question . . . is whether the new provision imposes greater punishment after the commission of the offense, not merely whether it increases a criminal sentence." *Id.* at 32. Here, Vehicle Code §23550 uses prior convictions, not merely as sentencing enhancements for recidivist offenders, but also as an

element of a hybrid offense – felony DUI. Consequently, the terms of §23550 necessarily attach to the triggering prior conviction when it is entered because it is by virtue of the triggering prior conviction that the defendant who reoffends within the prescribed time is introduced to the harsher process attending a felony charge (much like a defendant who violates probation). In effect, §23550 operates as a penal disability, imposing a kind of "probation" to deter defendants from being arrested for a fourth DUI within a set period of time under penalty of a subsequent arrest being transcended to a felony charge. *Cf. Trop v. Dulles* (1958) 356 U.S. 86, 96-7 ("If the statute imposes a disability for the purposes of punishment – that is, to reprimand the wrongdoer, to deter others, etc., it has been considered penal." (Internal footnotes omitted)).

C. California Vehicle Code §23550 Violates *Calder* Category II

Calder's second category encompasses "[e]very law that aggravates a crime, or makes it greater than it was, when committed." *Calder*, 3 U.S. at 390; *accord*, *Stogner*, 539 U.S. 607. As applied to defendant, the amending legislation subjected defendant to an additional period of disability for his December 8, 1997 DUI after the original seven year term had expired. The disability period expired on December 8, 2004 and the amendment to §23550 became effective January 1, 2005. Application of the amendment to Petitioner's 1997 offense would subject Petitioner to

"punishment that courts lacked the power to impose" before the amendment, thus, the amending legislation violates that facet of the *ex post facto* prohibition. (*Stogner,* 539 U.S. at 615.)

The January 1, 2005 amendment to Vehicle Code §23550 further "aggravates" Petitioner's 1997 offense because of the additional "burdensome" process that Petitioner was subjected to when his 1997 offense was resurrected to elevate his September 10, 2005 offense into a felony.

Sweet's premise that §23550 is nothing more than a recidivist sentencing statute that is not triggered unless a subsequent DUI conviction is entered is factually and legally inaccurate. §23550 is not triggered by a subsequent conviction, it is triggered by a subsequent *arrest.* Pursuant to Penal Code §§17-19, §23550 changes the classification of the later offense from a misdemeanor to a felony and the §23550 *arrestee* is subject to, *inter alia,* bail that is at least more than three (3) times what it would otherwise be.

Penal Code §1269b(b) provides that bail shall be set "pursuant to the uniform countywide schedule of bail for the county in which the defendant is required to appear." Orange County's bail schedule provides that a 23550 *arrestee* must be held subject to bail of $50,000. Conversely, an individual arrested for a misdemeanor violation of §23152 is held subject to bail of $2,500; bail for a second offense is set at $10,000, and the third offense is set at $15,000. (*See*

Appellant's Request for Judicial Notice; Orange County's 2006 Uniform Bail Schedule (Felony and Misdemeanor) available at http://www.occourts.org/criminal/bailsched.pdf; accessed November 14, 2008).

The 23550 *arrestee* is also required to provide fingerprint, palm print, blood, and other bodily fluid samples for inclusion in a DNA database. *See* Penal Code §296.1 which requires that "buccal swab samples and thumb and palm print impressions and any blood or other specimens required . . . [be taken] ***immediately following arrest,*** or during the booking or intake or reception center process or as soon as administratively practicable after arrest, but, ***in any case, prior to release on bail or pending trial or any physical release from confinement or custody."*** (emphasis added).

The 23550 *arrestee* is subjected to the foregoing requirements before he is even allowed to leave the police station. The more stringent procedures continue once the case settles into a courtroom. Compare Penal Code §858, *et seq.* (Chapter 7, *"Preliminary Examination, Discharge, or Holding to Answer"* – establishing the post-arrest process for individuals arrested on a felony charge), with Penal Code §853.6, *et seq.* (Chapter 5C, *"Citations for Misdemeanors under State Law"* – delineating, *inter alia,* the informal process for releasing arrestees charged with misdemeanors).

An individual with prior 23152 arrests, but no prior 23152 convictions, would *not* be subjected to any

of the harsher foregoing infringements on his liberty and liberty interests. Thus it becomes clear that §23550 is triggered by a subsequent *arrest* within the prescribed time of the last prior triggering offense which resulted in a conviction. Accordingly, the date at which §23550's disability is annexed to a crime must be the date of the prior triggering offense because the prior triggering violation is an ingredient of the substantive hybrid offense. *See* Vehicle Code, §23550(a) ("If any person is convicted of a violation of §23152 and the offense occurred within seven years of three or more separate violations . . . which resulted in convictions, that person shall be punished by imprisonment. . . ."); *Weaver v. Graham*, 450 U.S. at 31 ("[I]t is the effect, not the form, of the law that determines whether it is *ex post facto*. The critical question is whether the law changes the legal consequences of acts completed before its effective date." (Footnote omitted)).

From the foregoing, it is clear that application of §23550 to Petitioner is not just additional punishment for his latest crime, but acts to aggravate his prior crime in a way which offends our constitution. Not only is the punishment for his latest crime more severe, but a disability that was attached to his initial crime has been made worse, by extending it longer in time, after it had, by its own terms, expired. As laudable as it is to deter DUI offenders with increased liability for future offences, that cannot be done by stepping back in time and changing the

conditions attached to the prior crimes, at least not after those conditions have been met and terminated.

D. California Vehicle Code §23550 Violates *Calder* Category IV

In *Stogner*, Justice Breyer noted that the retroactive revival of a time barred prosecution also implicated the Fourth Category of *Calder's ex post facto* analysis:

> In finding that California's law falls within the literal terms of Justice Chase's second category, we do not deny that it may fall within another category as well. Justice Chase's fourth category, for example, includes any "law that alters the *legal* rules of *evidence,* and receives less, or different, testimony, than the law required at the time of the commission of the offense, *in order to convict the offender.*" *Calder, supra,* at 390, 1 L.Ed. 648. This Court has described that category as including laws that diminish "the quantum of evidence required to convict." *Carmell, supra,* at 532, 120 S.Ct. 1620. Significantly, a statute of limitations reflects a legislative judgment that, after a certain time, **no quantum of evidence is sufficient to convict.** See *United States v. Marion,* 404 U.S. 307, 322, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971). . . . [This] Court once described statutes of limitations as creating "a presumption which renders proof unnecessary." *Wood v. Carpenter,* 101 U.S. 135, 139, 25 L.Ed. 807 (1879).

> Consequently, to resurrect a prosecution after the relevant statute of limitations has expired is to eliminate a currently existing conclusive presumption forbidding prosecution, and thereby to permit conviction on a quantum of evidence where that quantum, at the time the new law is enacted, would have been legally insufficient. And, in that sense, the new law would "violate" previous evidence-related legal rules by authorizing the courts to "'receiv[e] evidence . . . which the courts of justice would not [previously have] admit[ted]'" as sufficient proof of a crime, *supra,* at 2450. *Stogner*, 539 U.S. at 615-6.

The typical habitual offender statute only requires the prosecution to establish that crime (A) was committed, and that defendant had a separate or prior offense – crime (B). A special limited statute such as Vehicle Code §23550 requires proof of element (C): Proof that offense (B) occurred within a defined period of time from offense (A). The 2005 Amendment to Vehicle Code §23550 changed element (C) from seven years to ten years, not only aggravating Crime (B) by extending the time it could be used to elevate a misdemeanor DUI into a felony and subjecting Petitioner to a felony prosecution, but also changing the amount and character of evidence necessary to convict. This express legislatively granted limitation creates an entirely different paradigm from which to judge the constitutionality of a change in that time limit since it implicates Calder's Category Four, which classified laws which changed the rules of

evidence or the quantum of evidence to make it easier to convict. On December 8, 2004, Petitioner's 1997 separate offense became legally irrelevant and could not have been used as evidence to elevate a new separate offense to a felony based upon the 1997 conviction.

In a felony prosecution under Vehicle Code §23550, the prosecution is required to plead and prove, at a preliminary hearing, the necessary quasi-element of three separate DUI convictions for offenses which occurred within a proscribed time period in order to hold the Petitioner to answer for a felony. *People v. Casillas* (2001) 92 Cal.App.4th 171, 184-5. In Petitioner's case, the oldest qualifying offense was committed in 1997. At that time, an offense which resulted in a conviction was priorable for seven years. In Petitioner's case his limited period of priorability for his 1997 case expired on December 9, 2004, prior to the effective date of the extension of priorability to ten years found in the amendment to §23550. Thus, as of December 9, 2004, proof of Petitioner's 1997 DUI offense would have been insufficient as a matter of law to not only convict Petitioner of a felony DUI, but to even hold him to answer for trial after a preliminary examination. The Court of Appeal's Opinion is flawed for failing to address this pivotal distinction that results in a retroactive change in the quantum of proof required to support a felony prosecution.

In Petitioner's case, the retroactive application of the January 1, 2005 amendment to Vehicle Code §23550 impermissibly allows a necessary element of a felony offense to be established with evidence that

would have previously been insufficient as a matter of law.

The key to Category Four is defining what quantum of evidence was required to convict both before and after the change in §23550. Before amendment of §23550, Petitioner could not have been charged with a felony DUI. To be charged with felony DUI, the prosecution would have been required to plead and prove the existence of three separate prior convictions for DUI offenses committed within seven years. After December 8th, 2004, the existence of his three prior offenses within seven years could not have been established by any amount of evidence because the 1997 prior offense has passed beyond that period and was unreachable by the state. In essence, no quantum of evidence existed which could make Petitioner guilty of Felony DUI based on prior offenses. By an act of grace of the legislature, the limitation on usage of Petitioner's earliest prior offence had become effective. The state itself had put that first conviction out of reach. The court must recognize that "a statute of limitations reflects a legislative judgment that, after a certain time, no quantum of evidence is sufficient to convict." *See United States v. Marion* (1971) 404 U.S. 307, 322.

After the effective date of the amendment to §23550, the state asserts that it can now reach back ten years. What it could not do before (prove up sufficient prior convictions to charge Petitioner with a felony), the state now says that it can. Prior to the state's attempted application of the new §23550 to

Petitioner, no evidence in the universe was available that was sufficient to charge him with a felony. Changing the rules of evidence in this way falls squarely within the examples of prohibited *ex post facto* legislation, such as the case of Sir John Fenwick. In Fenwick's case, the British Crown sought to prosecute him under a law which required the testimony of two witnesses. After Fenwick convinced one of the two available witnesses to abscond, the Crown changed to rules of evidence to allow conviction based on the testimony of only one witness, changing the quantum of evidence required for conviction. This was *ex post facto! Calder, supra* at 389. *See also Carmell v. Texas*, 529 U.S. at 526-30.

Here, the state requires the testimony of essentially three witnesses (prior convictions) in order to convict Petitioner of a felony. One of those witnesses has become unavailable. The state would otherwise be unable to prove its case, but it seeks to change its own rules. It seeks, rather than lessening the number of prior convictions, to make the prior convictions apply longer, but in essence it has the same effect. A prosecution that could not have proceeded before, can now proceed. The government cannot change the quantum of evidence required to convict, in order to make conviction easier. Thus, in this case, it would go against firmly established precedent to extend a sunset period which had already expired. As was reiterated in *Stogner v. California*, where the court noted that "the expiration of a statute of limitations is irrevocable. . . ." *Stogner*, 539 U.S. at 620.

II. THE DECISION BELOW IS IN CONFLICT WITH THE PRINCIPLES OF DUE PROCESS UNDER THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION BY VIOLATING THE PETITIONER'S RIGHT TO SPECIFIC PERFORMANCE OF HIS PLEA AGREEMENT

United States Supreme Court precedent has established that a criminal defendant has a due process right to enforce the terms of his plea agreement. *Santobello v. New York* (1971) 404 U.S. 257. To be valid, a plea agreement must be voluntary and intelligent. *Mabry v. Johnson* (1984) 467 U.S. 504. The court must be satisfied that the defendant understands the "nature of the charge and the consequences of the plea." *Brady v. United States* (1970) 397 U.S. 742, 744. "[I]f a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void." *Boykin v. Alabama* (1969) 395 U.S. 238, 243. Therefore, the courts must determine that the defendant "has a full understanding of what the plea connotes and of its consequence." *Id.* at 244.

In California, this is accomplished by recording the terms of the plea agreement and the defendant's waiver of rights and acknowledgments on a written form, often denoted a "Tahl Form." *In re Tahl* (1969) 1 Cal.3d 122 (decided by the California Supreme Court just after, and in response to, *Boykin v. Alabama* (1969) 395 U.S. 238).

Petitioner completed just such a form in this case.[4] The first page of the agreement states "READ THE FOLLOWING. IF YOU UNDERSTAND AND AGREE TO EACH PROVISION, INITIAL EACH BOX, AND DATE AND SIGN AT THE END OF THE FORM." Petitioner initialed some 70 times the various provisions of the plea agreement, and signed it in three places. The second page of the form also contains the statement from the Petitioner that "I have personally initialed each of the above boxes and understand each and every one of the rights outlined above."

In addition, the plea agreement on the first page, paragraph 6, reads "I understand that if I am charged and convicted of a similar offence in the future that the plea of guilty/nolo contendere I now enter may be used to increase my punishment, the consequences of which have been explained to me on pages 3 and 4 of this form." Pages 3 and 4 are a chart entitled "Consequences of Plea of Guilty/nolo contendere to Section 23152 and Other Selected Vehicle Code Sections." Sections 1 (b), (c), (d) each contain the provision that the charge "may be alleged as separate violations for 7 years."

The construction and interpretation of plea agreements is a matter of state law. *Ricketts v. Adamson*, 483 U.S. 1 (1987). Under California law, a

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[4] A true and correct copy of this form is attached hereto and incorporated herein by reference as Appendix C.

plea agreement is a form of contract, and is interpreted according to general contract principles. *People v. Shelton* (2006) 37 Cal.4th 759, *People v. Nguyen* (1993) 13 Cal.App.4th 114. Therefore, where California's highest court fails to analyze a plea agreement under California contract law, it violates the due process rights of the defendant under the 14th Amendment, giving rise to this Court's jurisdiction under 28 U.S.C. 1257(b).

Subsequent interpretations of a plea agreement/contract must be based on an objective standard in which the defendant's "reasonable beliefs" control. *People v. Toscano* (2004) 124 Cal.App.4th 340, 345, citing *U.S. v. De La Fuente* (9th Cir. 1993) 8 F.3d 1333, 1337, and *Mabry v. Johnson* (2007) 467 U.S. 504, 507-11. In interpreting the plea agreement, courts look to the specific language of the bargain. *Nguyen*, 13 Cal.App.4th at 122. Here, the only reasonable inference which follows from the combinations of statements concerning future offenses on the first page, line 6 (which petitioner initialed), and the Consequences of the Guilty Plea (which petitioner initialed on every line of page 3 and 4), is that the current offense could be used to enhance the punishment of future offenses for only seven years. A reasonable person, looking at the language of the plea agreement, would believe that the agreement limited the use of the conviction for enhancing the punishment or elevating a misdemeanor charge to a felony for any future offenses to seven years. That's what the document says.

Even if a Court were to consider the seven-year enhancement provision ambiguous, courts must interpret that language from what the promisor would have believed the promisee understood the language meant at the time of making it. *Wolf v. Superior Court* (Cal.App. 2004) 114 Cal.App.4th 1343, using the standard of "what a reasonable person would believe" the parties intended, *El Escorial Owners Association v. DLC Plastering, Inc.* (Cal.App. 2007) 154 Cal.App.4th 1337.

In addition, there is nothing in the plea agreement that suggests that this term is subject to change if the law changes. In fact, that would be contrary to the principle of California contract law that all laws in existence when the agreement was made become part of the contract. *Castillo v. Express Escrow Co.* (2007) 146 Cal.App.4th 1301. The existing applicable law is part of every contract, the same as if expressly referred to or incorporated in its terms. *People v. Gipson* (2004) 117 Cal.App.4th 1065. In fact, "when statutory language is included in a contract, it assumes a new legal identity; that of contractual language." *300 DeHaro Street Investors v. Department of Housing and Urban Development* (2008) 161 Cal.App.4th 1240. Therefore, rather than merely being advisory, by being included as part "of this form" the language of the chart becomes an enforceable term of the contract. This provides certainty in the contract. It assures the intent of the parties is effectuated under the law at the time and is not subject to the uncertainty of later statutory changes.

The parties have agreed to the law that will govern the agreement.

As this Court has noted in *Mabry v. Johnson* (1984) 467 U.S. 504, 511: [Petitioner] "was fully aware of the likely consequences when he pled guilty; it is not unfair to expect him to live with those consequences now." By the same token, it is not unfair to expect the government to live with them too.

The court below did not properly analyze the contract questions presented by petitioner's case. The court's entire treatment of the issue fit in one paragraph:

> The guilty plea form stated, in paragraph 6 thereof: "I understand that if I am charged and convicted of a similar offense in the future that the plea of guilty/nolo contendere I now enter may be used to increase my punishment, the consequences of which have been explained to me on page[s] 3 and 4 of this form." Attached as pages 3 and 4 of the form was a chart providing a synopsis of certain then current Vehicle Code provisions affecting the length of sentence for habitual offenders. As stated in *People v. Forrester, supra,* 156 Cal.App.4th 1021: "The chart simply provide[d] information concerning the relevant law at that time. No language in the plea agreement, nor any evidence supports the contention that [defendant] relied on the information in the chart in entering his plea. Nor would such reliance have been reasonable." (*Id.* at p. 1025.) Indeed, defendant has

> made no assertion that it was represented to him that the Legislature would never change any of the laws pertaining to the sentencing of habitual offenders. *Treadway*, 163 Cal.App.4th at 698.

The Court of Appeal's reliance on *People v. Forrester* (2007) 156 Cal.App.4th 1021 is misplaced because the plea agreement in *Forrester* was not as specific as the one used in *Treadway*. The Court in *Forrester* specifically noted that the form contained a chart listing penalties for DUI convictions depending upon the number of prior DUI offenses committed within the previous seven years. *Id.* at 1025. By contrast, the form in *Treadway* required that Treadway acknowledge his understanding and agreement to every provision in the agreement including the advisement of the length of the period of priorability (*see* App. 16-31). In analyzing the reasonableness of Treadway's belief that the seven year sunset provisions contained in his plea agreement limited the use of this offense to the express term of seven years courts must admit the full scope of the law to which Petitioner would have notice. This notice would include the rules of statutory construction that inform him that the amended statute would not act to change the conditions attached to his previous offenses, at least the ones for which his disability had lapsed. Petitioner would presumably be on notice that under the rules of statutory construction in California, the appellate court must construe an enactment to preserve its constitutional validity, and the court presumes that the enactors understood the

constitutional limits on their power and intended the enactment to respect those limits and act prospectively only in the absence of a specific provision to the contrary. *Save Our Sunol, Inc. v. Mission Valley Rock Co.* (2004) 124 Cal.App.4th 276. Thus, it would be reasonable for Treadway to believe that any subsequent changes in the law would act prospectively only and not alter the plea agreement that he entered into.

The Court of Appeal seemed to suggest that the chart containing the 7 year term was not actually part of the plea agreement. While the chart does set out the law current at that time, that is not simply all it does. As discussed above, by incorporating the 7 year term into the agreement, it becomes part of the contract. *300 DeHaro Street Investors v. Department of Housing and Urban Development*, 161 Cal.App.4th 1240 (Cal.App. 2008).

The Court of Appeal implies that there is no evidence that Petitioner relied on this term in entering into his agreement. How would such evidence have looked? Petitioner was advised of the term, and found it an acceptable part of the agreement. Indeed, he personally initialed the form stating that he both understood and agreed to the provision that his plea could be used to aggravate a future violation for a term of seven years. There was no need to negotiate over the term. At that time there was no indication that the term would change, or that Petitioner should expect it to change. Furthermore, by agreeing to the term, Petitioner would not expect any change in the term to apply to him. His agreement limited the

priorability of the term to 7 years. This is in strong contrast to *Hair v. State of California*, 2 Cal.App.4th 321, 328-29, the case relied upon in *Forrester* to support its lack of reliance argument. *Hair* simply held that the holder of a winning lottery ticket could not rely upon representations on a cigarette manufacturer's poster in market which erroneously stated the terms of the pay-out for winning lottery tickets.

This Court's decision in *Miller*, 482 U.S. at 423, makes it clear that it is reasonable for a defendant to rely upon the express provisions of a plea agreement which limit, in time, the use of that current case to enhance penalties and elevate misdemeanors to felonies in the future. Indeed, in *Miller,* this Court noted in an *ex post facto* challenge, that constitutional problems are not "avoided merely by adding to a law notice that it might be changed." (*Id.*)

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

BARRY T. SIMONS
Attorney for Petitioner
Michael Treadway

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL DEAN TREADWAY, Defendant and Appellant.	G038824 (Super. Ct. No. 05HF1852) OPINION (Filed Jun. 3, 2008)

Appeal from a judgment of the Superior Court of Orange County, Brett London, Judge. Affirmed. Request for judicial notice granted.

Law Office of Barry T. Simons, Barry T. Simons and Ronald L. Moore for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Steve Oetting, Robin Derman and Emily R. Hanks, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant Michael Dean Treadway (defendant) was sentenced pursuant to Vehicle Code section 23550 for suffering a fourth drunk driving conviction

within a 10-year period.[1] He appeals from the order overruling his demurrer and denying his motion to strike prior conviction. Section 23550 was amended in 2004 to extend the "look-back" period pertaining to prior convictions from the seven-year period formerly in effect to the 10-year period currently in effect. Defendant claims that current section 23550, as applied to him, constitutes an ex post facto law, and violates both his due process rights and the principles of estoppel. These arguments are based on the fact that the oldest of his four offenses was more than seven, although less than 10, years old at the time the amended statute went into effect.

Although defendant acknowledges that there are two cases almost precisely on point, i.e., *People v. Sweet* (1989) 207 Cal.App.3d 78 and *People v. Forrester* (2007) 156 Cal.App.4th 1021, he observes that both of those cases were written by the same court, and says that they were wrongly decided. Defendant contends that they are contrary to the Supreme Court precedent of *Stogner v. California* (2003) 539 U.S. 607. We disagree with defendant's assertions. Nothing in *Stogner v. California, supra,* 539 U.S. 607, which addressed an expired statute of limitations, casts doubt on either *People v. Sweet, supra,* 207 Cal.App.3d 78 or *People v. Forrester, supra,* 156 Cal.App.4th 1021, neither of which pertained to a

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[1] All subsequent statutory references are to the Vehicle Code unless otherwise expressly provided.

revival of an expired statute of limitations. *People v. Sweet, supra,* 207 Cal.App.3d 78 and *People v. Forrester, supra,* 156 Cal.App.4th 1021 remain good law. We grant defendant's request for judicial notice, but reject his substantive arguments, and affirm.

I

FACTS

Defendant was arrested for drunk driving on September 10, 2005. The Orange County District Attorney thereafter filed a five-count felony complaint alleging defendant: (1) violated section 23152, subdivision (a), driving under the influence of alcohol, and pursuant to section 23550, committed the offense within 10 years of three prior convictions; (2) violated section 23152, subdivision (b), driving with a blood alcohol content of at least .08 percent, and pursuant to section 23550, committed the offense within 10 years of three prior convictions; (3) violated section 14601.2, subdivision (a), driving on a suspended license; (4) violated section 31, providing false information to a peace officer; and (5) violated Penal Code section 148.9, subdivision (a), falsely representing identity to a peace officer. It was further alleged, pursuant to section 23578, that defendant's blood alcohol concentration exceeded .20 percent, and, pursuant to section 23577, subdivision (a)(5) and section 23578, that defendant willfully and unlawfully refused to submit to a chemical test. In addition, the complaint alleged three prior convictions: (1) an

August 6, 1998 conviction in *People v. Treadway* (Super. Ct. Orange County, 1998, No. 98SM41824) arising out of a violation of section 23152, subdivisions (a) and (b); (2) an August 6, 1998 conviction in *People v. Treadway* (Super. Ct. Orange County, 1998, No. 98SM44303) arising out of a violation of section 23152, subdivision (a); and (3) an August 14, 2003 conviction in *People v. Treadway* (Super. Ct. Orange County, 2003, No. 02SM04138) arising out of a violation of section 23152, subdivisions (a) and (b).

Defendant filed a demurrer and motion to dismiss prior allegation, an amended demurrer and motion to dismiss prior allegation, and an amended demurrer and motion to strike prior allegation. He asserted that at least one of the August 6, 1998 convictions arose out of a violation occurring on December 8, 1997, and that the application of the 10-year look-back provision of section 23550 to include that prior conviction constituted the application of an ex post facto law, an impairment of contract, and a violation of due process of law. In addition, he argued that the doctrine of estoppel barred the application of the 10-year look-back provision. The court overruled the demurrer.

Defendant pleaded guilty to each of the charges and admitted all of the enhancements, including the three prior convictions. He did not, however, waive his right to appeal, and the court issued a certificate of probable cause.

On May 4, 2006, the court sentenced defendant to 365 days in the Santa Ana Jail, 180 days of which would be stayed on the condition he spend 180 days in a sober living facility. Defendant was also sentenced to 3 years' formal probation, the payment of certain fines, and a four-year driver's license revocation. Defendant appeals.

II

DISCUSSION

A. REQUEST FOR JUDICIAL NOTICE:

As a preliminary matter, we address defendant's pending request for judicial notice. Defendant requests that we take notice of his guilty plea form in the matter of *People v. Treadway* (Super. Ct. Orange County, 1998, No. 98SM41824). The People have filed no opposition. The request is granted. (Evid. Code, § 452, subd. (d).)

B. SUBSTANTIVE ISSUES:

(1) Introduction –

Vehicle Code section 23550 provides: "(a) If a person is convicted of a violation of Section 23152 and the offense occurred within 10 years of three or more separate violations of Section 23103, as specified in Section 23103.5, or Section 23152 or 23153, or any combination thereof, that resulted in convictions, that person shall be punished by imprisonment in the state prison, or in a county jail for not less than 180

days nor more than one year, and by a fine of not less than three hundred ninety dollars ($390) nor more than one thousand dollars ($1,000). The person's privilege to operate a motor vehicle shall be revoked by the Department of Motor Vehicles pursuant to paragraph (7) of subdivision (a) of Section 13352. The court shall require the person to surrender the driver's license to the court in accordance with Section 13550. [¶] (b) A person convicted of a violation of Section 23152 punishable under this section shall be designated as a habitual traffic offender for a period of three years, subsequent to the conviction. The person shall be advised of this designation pursuant to subdivision (b) of Section 13350."

A former version of the statute contained a seven-year look-back period with respect to the prior convictions, but the period was extended to 10 years when the statute was amended in 2004. (Stats. 2004, ch. 550, § 15, p. 3392.) Defendant contends that under the former version of the statute, the disability arising from his December 8, 1997 offense expired in December 2004, which was before the effective date of the amendment. Consequently, to impose punishment under current section 23550 by including his December 8, 1997 offense as one of the three prior convictions would be a violation of the prohibition against ex post facto laws, of his due process rights, and of his plea bargain agreement with respect to that first conviction.

(2) Case law –

Defendant concedes that *People v. Sweet, supra,* 207 Cal.App.3d 78 and *People v. Forrester, supra,* 156 Cal.App.4th 1021 have already addressed, under very similar circumstances, the question of whether a statutory amendment extending a look-back period constitutes an unconstitutional ex post facto law, a due process violation, or a violation of a plea bargain agreement. However, defendant contends that these cases were erroneously decided, particularly in light of the Supreme Court decision in *Stogner v. California, supra,* 539 U.S. 607.

In *People v. Sweet, supra,* 207 Cal.App.3d 78, the court, addressing several former Vehicle Code provisions, considered whether "a statute which increases punishment on a new drunk driving conviction where the defendant has incurred prior convictions for that offense within seven years [could] be applied to prior convictions entered when five years was the maximum period in which prior convictions could be used for that purpose[.]" (*Id.* at p. 81.) The court stated that the statute could be so applied, without constituting an ex post facto law, or violating either the defendants' due process rights or the terms of their plea bargains. (*Id.* at pp. 82-83, 85-87.)

The *Sweet* court explained: "Statutes enacting punishment for a defendant convicted of violating section 23152 with prior convictions do not have the effect of being ex post facto laws. [Citation.] It is the law in effect at the time of commission of the offense

which controls. [Citations.] Both section 23152 and the enhancement statutes . . . were in force before appellants' present convictions and apprised them of the possible consequences of a new violation. [Citation.] Without their acts *after* passage of the new legislation, the enhanced punishment of these statutes would not come into play. [Citations.] [¶] Consequently, crimes for which appellants are punished are not the earlier convictions, but the subsequent offense of which the prior conviction constitutes only one element. [Citation.] The sentence imposed upon an habitual offender is not an additional punishment for the earlier crime, but 'a stiffened penalty for the latest crime,' which is considered aggravated because of its repetitive nature. [Citations.]" (*People v. Sweet, supra,* 207 Cal.App.3d at pp. 82-83.)

In addition, the *Sweet* court noted that the plea records showed that the five-year period was mentioned "in the context of the general advisement of possible penalties which could be imposed," that is to say, that the "[a]pellants were informed of the 'habitual offender' ramifications," and that neither the plea forms nor the docket entries indicated that the appellants entered "their pleas in reliance upon their ability to commit future crimes after five years without having their then current offenses come back to haunt them. . . . [Citation.]" (*People v. Sweet, supra,* 207 Cal.App.3d at p. 85.) The court also rejected the notion that the appellants had a vested right to rely on the five-year look-back period as in effect at the time of their prior convictions and stated that it found

"no fundamental unfairness in subjecting them to the increased period in which a court could consider their prior convictions so long as that extended period was enacted before the current offense." (*Id.* at p. 86.) Put another way, "[s]ince the ultimate punishment imposed is for the new offense, so long as the statute considering one's status as a repeat offender is in force at the time of the subsequent crime the offender is on constructive notice that habitual offenders face aggravated penalties and there is no due process violation. [Citation.]" (*Id.* at p. 87.)

Defendant insists that *People v. Sweet, supra,* 207 Cal.App.3d 78 was wrongly decided. He maintains that *Stogner v. California, supra,* 539 U.S. 607 is the controlling authority and that it unveils faulty reasoning in *People v. Sweet, supra,* 207 Cal.App.3d 78.

In *Stogner v. California, supra,* 539 U.S. 607, the Supreme Court described four categories of ex post facto laws: "1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. *2d. Every law that aggravates a crime, or makes it greater than it was, when committed.* 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. *4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.* All these,

and similar laws, are manifestly unjust and oppressive.' [Citation.]" (*Id.* at p. 612.)

The Court in *Stogner v. California, supra,* 539 U.S. 607, held that a California statute violated the constitutional prohibition against ex post facto laws (U.S. Const., art. I, § 10, cl. 1). (*Stogner v. California, supra,* 539 U.S. at p. 609.) The statute in question permitted the prosecution of certain sex-related child abuse crimes when the statute of limitations on those crimes had already expired, provided the victim had reported the abuse to the police, certain corroborating evidence had been obtained, and the prosecution had begun within a year of the report to the police. (*Ibid.*) The Court held that the statute fell into the second category of ex post facto laws described above. The Court explained that the second category applies to a statute that "'inflict[s] *punishments,* where the party was not, by *law,* liable to *any punishment*. . . .'" (*Id.* at p. 613.) It further explained that, in the case before it, after the statute of limitations had expired, the defendant was not subject to punishment, but that the new statute made the crime "'greater than it was, when committed,' in the sense that, and to the extent that, it 'inflicted punishment' for past criminal conduct that (when the new law was enacted) did not trigger any such liability. [Citation.]" (*Ibid.*)

The *Stogner* Court also said that the California statute might fall within the fourth category of ex post facto laws as well. (*Stogner v. California, supra,* 539 U.S. at p. 615.) It stated that "a statute of limitations reflects a legislative judgment that, after a

certain time, no quantum of evidence is sufficient to convict. [Citation.]" (*Ibid.*) "Consequently, to resurrect a prosecution after the relevant statute of limitations has expired is to eliminate a currently existing conclusive presumption forbidding prosecution, and thereby to permit conviction on a quantum of evidence where that quantum, at the time the new law is enacted, would have been legally insufficient. And, in that sense, the new law would 'violate' previous evidence-related legal rules by authorizing the courts to '"receiv[e] evidence . . . which the courts of justice would not [previously have] admit[ted]" ' as sufficient proof of a crime. [Citations.]" (*Id.* at p. 616.)

Defendant contends that *Stogner v. California, supra,* 539 U.S. 607 dictates the outcome in the case before us, because the seven-year look-back period in effect at the time of his first offense was, in essence, a statute of limitations. That is to say, once the seven-year period expired, that conviction could no longer be used against him as a prior conviction. The extended 10-year look-back period, he says, fell into the second and fourth categories of ex post facto laws as described in *Stogner.* Thus, application of the 10-year look-back period to his first offense would be a violation of the prohibition against ex post facto laws.

This argument was rejected in *People v. Forrester, supra,* 156 Cal.App.4th 1021. The defendant in that case also argued that *People v. Sweet, supra,* 207 Cal.App.3d 78 was no longer good law after *Stogner v. California, supra,* 539 U.S. 607. However, the *Forrester* court, construing section 23540, reaffirmed the

principles of *People v. Sweet, supra,* 207 Cal.App.3d 78. (*People v. Forrester, supra,* 156 Cal.App.4th at p. 1023.) It noted that there is a "difference between reviving a prosecution in its entirety after the statute of limitations has run, and enhancing the sentence in a *new* criminal prosecution stemming from *new* criminal conduct." (*Id.* at p. 1025.) The *Forrester* court further explained: "Here [the defendant's] prosecution stems from a law that became effective more than one year before the date of his arrest, and one that apprised him of the possible consequences of a new violation. Unlike Stogner, [the defendant] has not been charged with a crime for which the statute of limitations has run. He has not been deprived of a 'vested defense' because the statute extending the maximum period of prior offenses was enacted before the current offense. [Citation.]" (*Ibid.*)

People v. Sweet, supra, 207 Cal.App.3d 78 and *People v. Forrester, supra,* 156 Cal.App.4th 1021 are dispositive of the outcome of this case. (See also *People v. Wohl* (1990) 226 Cal.App.3d 270.) Here, defendant is not being punished for the 1997 offense; he is being punished for the 2005 offense. He was not convicted for the 1997 offense based on a quantum of evidence that would have been insufficient before section 23550 was amended; he was long ago convicted of that offense. Simply put, defendant committed a new crime in 2005, after the 10-year look-back period of section 23550 had come into effect. He was on notice of the law and the fact that, if he committed a new crime, all of his prior convictions within 10

years would be counted for the purposes of the statute.

In an effort to wriggle out of the application of the 10-year provision, defendant says that "[w]hile it is true that all citizens are on constructive notice of all changes in the law and that ignorance of the law is no defense, [he] received actual notice of the seven years of priorability attached to his 1997 offense when he read his guilty plea form. . . ." The guilty plea form stated, in paragraph 6 thereof: "I understand that if I am charged and convicted of a similar offense in the future that the plea of guilty/nolo contendere I now enter may be used to increase my punishment, the consequences of which have been explained to me on page[s] 3 and 4 of this form." Attached as pages 3 and 4 of the form was a chart providing a synopsis of certain then current Vehicle Code provisions affecting the length of sentence for habitual offenders. As stated in *People v. Forrester, supra,* 156 Cal.App.4th 1021: "The chart simply provide[d] information concerning the relevant law at that time. No language in the plea agreement, nor any evidence supports the contention that [defendant] relied on the information in the chart in entering his plea. Nor would such reliance have been reasonable." (*Id.* at p. 1025.) Indeed, defendant has made no assertion that it was represented to him that the Legislature would never change any of the laws pertaining to the sentencing of habitual offenders.

III

DISPOSITION

The request for judicial notice is granted. The judgment is affirmed.

MOORE, J.

WE CONCUR:

SILLS, P. J.

O'LEARY, J.

Court of Appeal, Fourth Appellate District,
Div. 3 – No. G038824
S165084

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

MICHAEL TREADWAY, Defendant and Appellant.

(Filed Aug. 20, 2008)

The petition for review is denied.

/s/ GEORGE
Chief Justice

DEFENDANT'S WAIVER OF CONSTITUTIONAL RIGHTS FOR GUILTY PLEA TO SECTION 23152 AND OTHER SELECTED VEHICLE CODE SECTIONS

Michael D. Treadway	Todd Landgren	5H98SM41824
Defendant's Name	Attorney's Name	Court Case No.

(Filed July 2, 1998)

DEFENDANT: READ THE FOLLOWING. IF YOU UNDERSTAND AND AGREE TO EACH PROVISION, INITIAL EACH BOX, AND DATE AND SIGN AT END OF FORM. [Defendant Initialed After Each Entry]

1. I understand that I am charged with the offense of 23152a/b cvc to which I intend to plead guilty/nolo contendere. [A nolo contendere plea has the same legal consequences as a guilty plea in a criminal case. P.C. §1016]

2. I understand that I violated this section on December 8, 1997 in Orange County by driving a vehicle (factual basis):

   a. ☐ while under the influence of an alcoholic beverage

   b. ☐ while alcohol in my blood was .08% or more, by weight;

   c. ☐ 23206.1 cvc Enhancement

3. I understand the maximum and mandatory minimum sentence for this offense is as subsequently set forth on this form.

4. I do hereby specifically, intentionally, voluntarily, and with full knowledge and understanding thereof give up each and all of my following rights:

   a. **To be represented by an attorney** of my own choice at all stages of the proceedings, or if I cannot afford an attorney, to have the Court appoint one to represent me, free of charge subject to the Court's requirement that I pay the cost thereof at the conclusion of these proceedings based upon my then financial ability.

   b. **To a speedy trial** that is: within 30 days of the day of my arraignment if I am in custody or within 45 days thereof if I am not in custody and to a dismissal of the charges against me if I am not so tried.

   c. **To a public trial** by a jury.

   d. **To subpoena witnesses** for my defense without expense to me.

   e. **To confront the witnesses** against me in trial and to cross-examine them myself or through my attorney.

   f. **To testify in my own defense, or to remain silent** if I so desire and to thereby refuse to give evidence that may be used against me.

   g. **To be sentenced in not less than 6 hours** or more than 5 days from the time of my plea of guilty/nolo contendere.

h. **To appeal the denial of my Penal Code Section 1538.5 Motion** (suppression motion) even after pleading guilty/nolo contendere.

5. I understand the nature of the charges against me, the elements thereof and the available pleas and defenses thereto.

6. I understand that if I am charged and convicted of a similar offense in the future that the plea of guilty/nolo contendere I now enter may be used to increase my punishment, the consequences of which have been explained to me on page 3 and 4 of this form.

7. I understand that if I receive probation and violate any of the terms thereof, I may be returned to Court and sentenced on this charge as set forth in paragraph 3 above. Also, if I am presently on probation for any previous case, I understand that my plea of guilty/nolo contendere may cause me to be in violation of probation, and result in additional penalties and/or punishments.

8. I understand that if I am not a citizen of the United States, the conviction for the offense may have the consequences of deportation, exclusion from the United States, or denial of naturalization pursuant to the laws of the United States.

9. I have no cases pending against me and none for which I have been convicted in the past 7 years which charge violation of Vehicle Code sections 23101, 23102, 23152 and 23153 – "Drunk Driving," or 23103 – "Reckless Driving" – which are not alleged as separate convictions in this case

except as follows: (Give date, section and court. Write NONE if none. This includes case against me under any other name or birthdate.)

CH98SM44303 pending

10. I understand, agree and stipulate that if I have not fully informed the court (and the district attorney) as required in #9 above, that this court may re-sentence me at any time during the term of my probation for this case and may take into consideration any prior convictions I failed to disclose as required above. I stipulate not to object to said re-sentencing and I will not attempt to withdraw my plea of guilty.

11. I understand that the following sentence will be recommended based on my truthful representation in #9 above, and if it is not so imposed that I may withdraw my plea:

    I.S.S. 3/5 years of informal probation (circle). Violate no laws. Not to drive with a measurable amount of alcohol in *my* blood system. Submit to chemical test of blood, breath, or urine, on demand and as specified by a peace officer or probation officer, with or without probable cause. Not to drive without a valid California driver's license on person. Pay a **fine** of $_____ plus penalty assesment. Pay **restitution fine** of $_____ to State Restitution Fund/perform community service as ordered (circle). ($1,000 maximum P.C. 1203.04) If victim involved, pay **restitution** of $_____, or as ordered by court. Pay $_____ **alcohol abuse prevention penalty** ($50 maximum

V.C. 23196(a)). **Pay Cost of Probation** as directed by probation officers 1203.1b P.C. Serve _____ days in Orange County **Jail**. Credit _____ days actual time served. Surrender car for impound of _____ days. Attend and complete Alcohol Education/ Treatment program as ordered.

See Addendum
plea to court.

12. My plea of guilty/nolo contendere is entered freely and voluntarily, and without any threats or promises made to me except as to the recommended sentence, if any.

~~13. **DEFENDANTS REPRESENTING THEMSELVES IN PRO PER:**~~
~~I understand that there are a number of dangers and disadvantages in representing myself in this case and that an attorney would possibly help me. Nevertheless, I choose to represent myself and voluntarily enter a plea of guilty/nolo contendere to the above charge~~.

DEFENDANT: I have personally initialed each of the above boxes and understand each and every one of the rights outlined above and I hereby waive and give up each of them and enter my plea of guilty/nolo contendere to the above charge. I understand that each of the rights outlined above also apply to proving the existence of separate convictions which are alleged. Said separate convictions are alleged to have occurred on as alleged. I understand that I have a right to a separate hearing to determine the constitutional validity of said separate convictions. I also

understand I have a right to a separate jury trial to determine whether I suffered the alleged separate convictions. I voluntarily, knowingly and intelligently waive and give up each of these rights and admit each of the separate convictions alleged in this complaint.

PERJURY: I declare all the foregoing to be true and correct under penalty of perjury.

DATED: 6-23-98, at IRVINE, CALIFORNIA

SIGNED x /s/ Michael Treadway, Defendant

DEFENDANT'S ATTORNEY: I am attorney of record and I have explained each of the above rights to the defendant, and having explored the facts with him and studied his possible defenses to the charge(s), I concur in his decision to waive the above rights and to enter a plea of guilty/nolo contendere. I further stipulate that this document may be received by the Court as evidence of defendant's intelligent waiver of these rights and that it shall be filed by the Clerk as a permanent record to that waiver. I have witnessed the reading of this form by the defendant and his initialings and signature upon it.

DATED: 6-23-98 SIGNED: [Illegible] ATTORNEY OF RECORD

FOR THE PEOPLE:

DATED: _____ SIGNED: _____ DEPUTY DIST. ATTY.

App. 22

AFTER READING, INITIALING AND SIGNING, GIVE TO COURTROOM CLERK

CONSEQUENCES OF PLEA OF GUILTY/NOLO CONTENDERE TO SECTION 23152 AND OTHER SELECTED VEHICLE CODE SECTIONS

DEFENDANT'S NAME Michael D. Treadway COURT CASE NO. SH98SM41824

PLEA OF GUILTY/NOLO CONTENDERE TO SECTION 23152a/b cvc

(Insert Code Section and Description of Offense/Defendant initials section of involved violation)

VIOLATION	MINIMUM SENTENCE		MAXIMUM SENTENCE		DRIVER'S LICENSE			VEHICLE IMPOUND/SALE	PROGRAM REQUIRED	DEFENDANT'S INITIALS
	WITHOUT PROBATION	WITH PROBATION Min 3 yr term, Max 5 yr term per VC 23206(b)	FINE	JAIL (*or state prison upon felony conviction)	SUSPEND	REVOKE	RESTRICT	(If registered to defendant VC23195)	(Driver Improvement, alcohol or drug treatment or both, may include community service)	
1. VC23152(a), (b), (c)*										
A. 1st Conviction	96 hours and $390 (additional 48 hrs with proven allegation of refusal of chemical test)		$1,000	6 months	6 months (1 year if under age 21 at time of offense)			1-30 days		MT★
		48 hours and $390 (additional 48 hrs with proven allegation of refusal of chemical test)	$1,000	6 months	6 months (1 year if under age 21 at time of offense)			1-30 days	Yes	MT
		$390 (additional 48 hrs with proven allegation of refusal of chemical test)	$1,000	6 months	1 year if under age 21 at time of offense		90 days (with proof of insurance provided to DMV and maintained for 3 years)	1-30 days	Yes	MT
B. 2nd Conviction in 7 years* May be alleged as separate violations for 7 yrs: VC 23152, 23153, or 23103 per 23103.5	90 days and $390 (additional 96 hrs with proven allegation of refusal of chemical test)		$1,000	1 year	18 months			1 day min; 30 days max**		MT

		10 days and $390 (additional 96 hrs with proven allegation of refusal of chemical test)	$1,000	1 year	18 months (additional 6 mos with proven allegation of refusal of chemical test)			1 day min; 30 days max**		MIT
		48 hours and $390 (additional 96 hrs with proven allegation of refusal of chemical test)	$1,000	1 year	1 year if under age 21 at time of offense		1 year (with proof of insurance provided to DMV and maintained for 3 years)	1 day min; 30 days max**	Yes	MIT
C	3rd Conviction in 7 years* May be alleged as separate violations for 7 yrs: VC 23152, 23153, or 23103 per 23103.5	120 days and $390 (additional 10 days with proven allegation of refusal of chemical test)		$1,000	1 year		3 years (surrender license to court; court to designate defendant an habitual traffic offender per VC 23170)		1 day min; 90 days max** Vehicle may be sold		MIT
		120 days and $390 (additional 10 days with proven allegation of refusal of chemical test)	$1,000	1 year			3 years (surrender license to court; court to designate defendant an habitual traffic offender per VC 23170)		1 day min; 90 days max** Vehicle may be sold	Yes	MIT

D. 4th or Subsequent Conviction in 7 years May be alleged as separate violations for 7 yrs: VC 23152, 23153, and 23103 per 23103.5 May be charged as felony	180 days and $390 (additional 18 days with proven allegation of refusal of chemical test)		$1,000	3 years State Prison		4 years (surrender license to court; court to designate defendant an habitual traffic offender per VC 23175)		1 day min; 90 days max** Vehicle may be sold		MT
		180 days and $390 (additional 18 days with proven allegation of refusal of chemical test)	$1,000	1 year		4 years (surrender license to court; court to designate defendant an habitual traffic offender per VC 23175)		1 day min; 90 days max** Vehicle may be sold	Yes	MT
2. VC 23103 (per 23103.5) If alcohol related, may be alleged as separate violations for subsequent 23152 and 23153 convictions within 7 yrs	5 days or $145		$1,000	90 days	Court may suspend for convictions. Maximum: 1st – 30 days 2nd – 60 days 3rd – 6 months					MT
3. VC 23153(a) or (b) A. 1st Conviction	90 days and $390 (additional 48 hrs with proven allegation of refusal of chemical test		$1,000	1 year *upon a felony conviction, 3 yrs State Prison	1 year			1-30 days		MT*
		5 days and $390 (additional 48 hrs with proven allegation of refusal of chemical test)	$1,000	1 year	1 year			1-30 days	Yes	MT

B. 2nd Conviction in 7 years May be alleged as separate violations for 7 yrs: VC 23152, 23153, or 23103 per 23103.5	120 days and $390 (additional 96 hrs with proven allegation of refusal of chemical test)		$5,000	1 year *upon a felony conviction, 3 yrs State Prison		3 years	1 day min; 30 days max** Vehicle may be sold		MT
		120 days and $390 (additional 96 hrs with proven allegation of refusal of chemical test)	$5,000	1 year		3 years	1 day min; 30 days max** Vehicle may be sold		MT
		30 days and $390 (additional 96 hrs with proven allegation of refusal of chemical test)	$1,000	1 year	1 year + 2 yrs restriction		1 day min; 90 days max** Vehicle may be sold	Yes	MT
C. 3rd Conviction in 7 years is a felony. May be alleged as separate violations for 7 yrs: VC 23152, 23153, or 23103 per 23103.5	2 years State Prison and $1,015		$5,000	4 years State Prison		5 years	1 day min; 90 days max** Vehicle may be sold		MT
		1 year and $390	$5,000	4 years State Prison		5 years	1 day min; 90 days max** see above		MT
		30 days and $390	$5,000	4 years State Prison		5 years	1 day min; 90 days max** see above	Yes	MT
4. VC 20002*			$1,000	6 months	**Defendant's Initials**				
5. VC 14601(a)									
A. 1st Conviction	5 days and $300	5 days and $300	$2,000	6 months	MT*				
B. 2nd Conviction After prior conviction of this section or 14601.1 or 14601.2 in 5 years	10 days and $500	10 days	$2,000	1 year	MT				

6. VC 14601.1(a)					
A. 1st Conviction	$300	$300	$1,000	6 months	MT
B. 2nd Conviction After prior conviction of this section or 14601.1 or 14601.2 in 5 years	5 days and $500	5 days and $500	$2,000	1 year	MT
7. VC 14601.2(a), (b) and 14601.4					
A. 1st Conviction	10 days and $300	10 days	$1,000	6 months	MT
B. 2nd Conviction After prior conviction of this section or 14601 in 5 years	30 days and $500	30 days	$1,000	1 year	MT
C. 2nd Conviction After prior conviction of this section or 14601 or 14601.1 in 7 years, but more than 5 years		10 days			MT
D. Conviction within 3 years of designation as habitual traffic offender per VC 23170 or 23175	180 days and $2,000 (to be served consecutive to any other sentence)	180 days and $2,000 (to be served consecutive to any other sentence)			MT
8. VC 12500(a)			$1,000	6 months	MT

The Department of Motor Vehicles may take or have taken independent action regarding driver's license.

Driver's license remains suspended or revoked until reissued by DMV; also, per VC 14602, vehicle may be impounded at owner's expense for maximum 6 months for 1st conviction and 12 months for 2nd conviction.

In addition to the fine imposed, the law requires the Court to add assessments which will significantly increase the amount you must pay. You may also be ordered to make restitution to the victim, if the offense involved a victim, or to a Restitution Fund. You may also be required to pay the expenses incurred by a public agency which responded to any incident caused by my vehicle at the time of my arrest, and the expenses of vehicle towing and storage.

★ Michael Treadway

* Conviction equals 2 points on the DMV point count against the license. (VC 12810) Other action can be taken independently by DMV, including suspension of license.

** Except in an unusual case where the interest of justice would best be served.

*** Or 10 days community service – 23206.5a VC – Additional minimum sentence if minor under 14 alleged as passenger; 1st conviction – 48 hrs, 2nd conviction – 10 days, 3rd conviction, 30 days, 4th conviction – 90 days.

People v. Michael Treadway Case No. SH98SM41824

ADDENDUM TO DEFENDANT'S WAIVER OF CONSTITUTIONAL RIGHTS FORM – TERMS OF PROBATION – **(DUI FIRST OFFENSE)**

DEFENDANT having been convicted for a violation of VEHICLE CODE SECTION 23152(a)(b) and legal cause being shown why judgement should not be pronounced. IT IS ORDERED that the imposition of sentence be suspended and that DEFENDANT be placed on probation from this date on the following terms and conditions:

1. [/s/ MT] Three (3) years informal probation.

2. [/s/ MT] Pay a fine of $500 Plus a penalty assessment of $850.00 for a total of $1,350.00

   Pay in full by ___/___/___, or Pay an initial payment of $___ on or before ___/___/___, and monthly payments as set by the judicial assistant thereafter until paid in full, (payments shall include all fines, penalties and fees discussed herein).

3. [/s/ MT] Serve ___ days in Orange County Jail. Credit for time served ___ days actual time *or* Serve ___ weekends, commencing ___/___/___ at ___ am/pm and the next consecutive weekends.

4. [/s/ MT] Obey all laws, orders, rules and regulations of the Probation Department, Court and Jail.

5. a. [/s/ MT] Pay restitution to the victim(s) as directed by Victim-Witness.

b. [/s/ MT] Pay $100.00 to the State Restitution Fund on or before ___/___/___.

6. [/s/ MT] Violate no law. Report in writing any arrest or conviction of a crime to this Court.

7. [/s/ MT] Do not drive with a discernable amount of alcohol in your blood system. Submit to a blood-alcohol test when requested by any police/peace officer. Said request may be made with or without reasonable cause or reasonable suspicion.

8. [/s/ MT] Do not drive after the date of conviction unless you have a valid California driver's license in your possession.

9. [/s/ MT] Do not drive after the date of conviction unless you have liability insurance.

10. [/s/ MT] Attend and successfully complete a First Offender's Alcohol Program, level ___. Enroll on or before ___/___/___ and provide proof to the Court of your enrollment. Notify this court in the event you are terminated from the program or are absent from more than 2 consecutive sessions of the program.

11. [/s/ MT] Do not drive for Ninety (90) days after conviction except (1) where necessary to travel to and from your place of employment (2) where necessary to perform the duties of you employment; and (3) to and from your alcohol program.

12. [/s/ MT] Pay Fifty Dollars ($50) alcohol abuse prevention penalty pursuant to VC23196(a).

13. [/s/ MT] Pay additional alcohol penalty fee of Thirty Seven Dollars ($37) per PC1463.14(c).

14. [/s/ MT] Attend on MADD panel and provide proof of attendance prior to ___/___/___.

15. [/s/ MT] Attend ___ AA meetings at intervals of ___ per week. Provide proof to the Court of your attendance on ___/___/___.

16. [/s/ MT] Pay booking fees in the amount of $_____ through Victim-Witness.

17. [/s/ MT] Consume no alcoholic beverages/do not go where such are the chief item of sale.

18. [/s/ MT] _____

19. [/s/ MT] _____

20/ [/s/ MT] _____

I have read and understand these terms of Probation.

Dated: 6-23-98 Defendant /s/ Michael Treadway

DDA: 6-2 Def. Attorney [Illegible]